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Supreme Court, U.S.
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No. 03-666

In The Supreme Court of the United States

OMNIPOINT COMMUNICATIONS ENTERPRISES, L.P.,
Petitioner

v.

ZONING HEARING BOARD OF EASTTOWN TOWNSHIP,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATEMENT

A. Respondent Wrongly Asserts that the Third Circuit's "One Provider" Rule Does Not Exist.

The Respondent opposes Omnipoint's Petition for a Writ of Certiorari based on the assertion that the Third Circuit's "one provider" rule "does not exist." Brief in Opposition to Petition for a Writ of Certiorari ("Brief") at 6. This assertion is directly contradicted by the panel decision below, which was entirely based on the one provider rule. In fact, the panel discussed the parameters of that rule in great detail. (App. 15a-23a) (discussing the Third Circuit's *Penn Township* ruling and reaffirming the one provider rule as first articulated in *Penn Township*). This discussion was central both to the original panel decision and to the revised decision on rehearing. Furthermore, the one provider rule – and the problems created by that rule – has been critically discussed by, *inter alia*: (1) the dissenting judge in this case, (2) other federal circuit courts, (3) federal district courts, (4) legal commentators, and (5) industry participants. *See, e.g.*, Brief of Amicus Curiae Nextel Communications, Inc. and Brief of Amici Curiae AT&T Wireless Services, Inc. and Verizon Wireless In Support of Petition for a Writ of Certiorari (collectively "Briefs of Amici Curiae") (discussing the one provider rule's negative effect on competition and growth in the wireless telecommunications industry).

The "'one provider rule' argument" was not "born" in the present Petition, as Respondent suggests. Brief at 4. Rather, the one provider rule is a well-established but controversial element of the Third Circuit's interpretation of the federal Telecommunications Act ("TCA"). The rule has been widely recognized as creating an important and unresolved conflict of law between the circuits.

B. The Third Circuit has Repeatedly Applied the One Provider Rule, Most Recently in the Present Majority Panel Decision.

As discussed in the Petition for a Writ of Certiorari, the Third Circuit imposes a "one provider" standard on prohibition of service claims brought under the TCA. The rule was first articulated in *APT Pittsburgh Ltd. v. Penn Township*, 196 F.3d 469 (3d Cir. 1999), and the Third Circuit has since reaffirmed the *Penn Township* holding. *Nextel West Corp. v. Unity Township*, 282 F.3d 257, 265 (3d Cir. 2002). This rule requires a prohibition of service petitioner such as Omnipoint to submit evidence that "the area the new facility will serve is not already served by another provider." (App. 17a, 21a). "[T]his prong focuses on whether any provider is covering the gap, instead of whether the gap exists" in the petitioner's own service. *Nextel West Corp.*, 282 F.3d at 265. Under this restrictive interpretation, prohibition of service claims are effectively barred wherever a single competing provider already serves a given geographical area. (App. 31a) (dissenting opinion) (disagreeing with the majority holding "that coverage by any provider precludes all statutory prohibition of service claims.")

In opposing the present Petition, the Respondent denies that *Penn Township's* one provider rule exists or that it formed the basis for the panel's majority decision. Brief at 4-6. Yet this is directly contradicted by the decision itself. The majority opinion cited approvingly to both *Penn Township* and *Nextel West Corp.* in reaffirming the one provider rule. (App. 20a-23a). Furthermore, the majority stated explicitly that it was rejecting the appeal because Omnipoint could not show that "the area the new facility will serve is not already served by another provider." (App.

20a-21a) (quoting *Nextel West Corp.*, 282 F.3d at 265). The majority referred repeatedly to evidence that other wireless carriers already provided service to the affected area. (App. 20a-22a). Based on this evidence, the panel concluded: "the Magistrate Judge properly applied *Penn Township*[.]" (App. 22a).

Moreover, the unusual panel proceedings below reflected an explicit debate among the panel members as to the viability of the one provider standard. In the original and unanimous panel decision, Judge Rosenn described as "puzzling" the statement from *Penn Township* that a prohibition of service petitioner such as Omnipoint must prove that "the area the new facility will serve is not already served by another provider." (App. 41a). The panel held that this rule "would seem to prohibit any provider from serving an area already served by another provider," and that it would "promote monopolization and thus conflict with the pro-competitive objectives of the TCA." *Id.* Accordingly, the original decision held that in determining whether there was a "significant gap in service" actionable under the TCA, the reviewing Court must consider the gap in the petitioner's own wireless communications system. (App. 41a-42a).[1]

The Township filed a request for reconsideration of this decision, arguing that panel had usurped *Penn Township's* requirement that "an applicant wireless provider will have to show that other, non-applicant providers do

[1] In a concurring opinion, Judge Sloviter indicated that she had "reservations" that this decision "may not be consistent with our holding in *Penn Township*." (App. 50a-51a).

not already provide adequate service in the area in question." Petition of Appellee for Rehearing En Banc at 4, *Omnipoint Communications Enterprises, L.P. v. Zoning Hearing Board of Easttown Township*, 331 F.3d 386 (3d Cir., June 4, 2003). "If the area in question is already being served adequately by other providers, there is no gap for the purposes of the TCA." *Id.* On rehearing, two of the three panel members agreed and therefore reversed course. The second panel opinion held that under *Penn Township*, Omnipoint was required to prove that a service gap existed for all other wireless providers, and that evidence of Omnipoint's own gap in service was irrelevant to that determination.[2] (App. 21a). Judge Rosenn wrote in dissent to reiterate that this holding would threaten "Congress' goal of promoting the rapid acceleration of private sector deployment of advanced telecommunication and information technologies to all Americans." (App. 32a).

Contrary to Respondent's current argument, therefore, *Penn Township's* one provider rule was central to the holding below and to the panel's decision on rehearing to revise its original ruling. In fact, in seeking rehearing the Respondent relied on the *Penn Township* standard that it now argues does not exist.

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[2] Respondent's brief ignores this important aspect of the decision below. The requirement that a reviewing court ignore evidence of the petitioner's service gap clearly reflects the anti-competitive effect of the one provider standard. (App. 21a) (the panel majority held that the service gap must be measured without reference to "data from the applicant provider.") A TCA petitioner such as Omnipoint would only bring a prohibition of service claim because it suffers from a significant gap in its own wireless services coverage. Yet under the majority panel decision that gap in coverage is irrelevant in determining whether petitioner's prohibition of service claim is valid.

Respondent also argues that because multiple providers already serve the disputed area, rather than a single provider, the majority decision does not implicate the one provider rule. Brief at 2-6. This argument ignores two important aspects of the one provider standard. First, it moves the focus of the TCA prohibition of service test from the existing quality of service of the provider applicant to the existing quality of service of the competing carriers that already serve the disputed area. Second, pursuant to *Penn Township* and *Nextel West Corp.*, application of the rule does not depend on the relative number of additional providers already serving Easttown Township. Instead, the presence of even a single competing provider is sufficient to defeat Omnipoint's prohibition of service claim. In summary, the anticompetitive effects of the rule are the same regardless of how many providers already serve the area. Every future entrant to this wireless communications market will be permanently barred from relief under the prohibition of service prong of the TCA.

In arguing that the one provider rule does not exist, the Respondent also relies on a statement from the majority rehearing opinion that is taken out of context. As quoted in Respondent's brief, the panel majority stated: "But nothing we say here suggests that the zoning board can deny all applications after the first." Brief at 5-6 (citing App. 21a). Respondent fails to point out that the panel here was referring to an alternative form of relief under the TCA, the "anti-discrimination" provision of 47 U.S.C. § 332(c). (App.21a-22a). The panel's brief discussion of that alternate provision did not amend the one provider standard as applied to prohibition of service claims. Furthermore, as discussed in the Petition the unreasonable discrimination provision has been strictly construed

by the Third Circuit and by other courts. It therefore does not correct for the anti-competitive effects of the one provider rule. *See* Omnipoint's Petition for a Writ of Certiorari at 23-25 (discussing the strict interpretation imposed on anti-discrimination claims under the TCA and demonstrating that this provision does not temper the impacts of the Third Circuit's one provider rule).

C. The Third Circuit's One Provider Rule Has Been the Subject of Much Debate and Analysis.

Contrary to Respondent's assertion that Omnipoint invented the one provider standard "in an attempt to fashion a certiorari-friendly rule that simply does not exist," Brief at 6, the rule has been the subject of much debate, including in the present case. As noted above, discussion of the one provider rule was central to the proceedings below. The final majority decision was expressly based on the application of that rule. (App. 20a) (citing *Penn Township* and finding that Omnipoint had failed to prove the existence of a significant gap in service). In fact, in his superceded panel opinion and in his dissent from the ruling on rehearing Judge Rosenn discusses the negative consequences of the one provider standard. He confirms the Petitioner's concern that it will stifle competition and suppress the deployment of advanced telecommunications networks. "The majority approach today threatens Congress' goal of promoting the rapid acceleration of private sector deployment of advanced telecommunication and information technologies to all Americans." (App. 32a) "The . . . opinion will effectively impede the development of new digital technologies that have more limited range but superior capabilities." (App. 32a).

The Court of Appeals for the First Circuit has evaluated and explicitly rejected the Third Circuit's one provider approach in favor of a more flexible standard. *Second Generation Properties L.P. v. Town of Pelham*, 313 F.3d 620, 632-34 (1st Cir. 2002) (rejecting the third Circuit rule because "the result would be a crazy patchwork quilt of intermittent coverage. That quilt might have the effect of driving the industry toward a single carrier."). The *Second Generation* ruling creates a clear split with the Third Circuit. Likewise, federal district courts have evaluated and rejected the Third Circuit rule. *See, e.g., MetroPCS, Inc. v. City & County of San Francisco*, 259 F.Supp.2d 1004, 1013 (N.D.Cal. 2003) (evaluating the split between the First and Third Circuits and adopting the First Circuit's more flexible standard). The "one provider" problem has also been recognized by legal commentators (*see, e.g.*, Stephanie Niehaus, Note, *Bridging the (Significant) Gap: To What Extent Does the Telecommunications Act of 1996 Contemplate Seamless Service?*, 77 NOTRE DAME L. REV. 641 (2002)), and by other industry participants (*see* Briefs of Amici Curiae) (discussing the practical anti-competitive effects of the one provider rule and its stifling effect on the deployment of advanced telecommunications networks).

Given the widespread recognition and discussion of the Third Circuit's one provider rule, it is surprising that the Respondent opposes the present Petition by arguing that the rule does not exist. This assertion is demonstrably untrue. The rule exists, it creates a clear circuit split, and it represents a recurring issue of extraordinary importance that requires resolution by this Court.

CONCLUSION

The Petitioner respectfully renews its request that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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